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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1219

SCENIC HUDSON PRESERVATION CONFERENCE, *et al.*,

Petitioners,

—v.—

FEDERAL POWER COMMISSION,
CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., *et al.*,

Respondents.

No. 71-1220

THE CITY OF NEW YORK,

Petitioner,

—v.—

FEDERAL POWER COMMISSION,
CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., *et al.*,

Respondents.

No. 71-1221

THE SIERRA CLUB AND ITS ATLANTIC CHAPTER,

Petitioners,

—v.—

FEDERAL POWER COMMISSION,
CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., *et al.*,

Respondents.

BRIEF OF CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., IN OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI

Opinion Below

The opinion below ("*Scenic Hudson II*") of the United States Court of Appeals for the Second Circuit is reported at 453 F.2d 463 and is reprinted in the appendices of the petitions for certiorari filed herein by Scenic Hudson Preservation Conference and City of New York. That opinion reviewed and affirmed, as supported by substantial evidence and the applicable statutes, the Federal Power Commission's Order and Opinion licensing construction of the proposed Cornwall Project, a pumped storage hydroelectric facility to be constructed and operated at an underground site on the Hudson River by respondent, Consolidated Edison Company of New York, Inc.

Jurisdiction

Jurisdiction is authorized under 28 U.S.C. §1254(1) and the Federal Power Act §313(b), 16 U.S.C. §825*l*(b).

Questions Presented

1. Whether the Court of Appeals was bound by the mandate of §313(b) of the Federal Power Act which provides that "The finding of the Commission as to the facts if supported by substantial evidence, shall be conclusive"; or whether some standard other than the substantial evidence rule should have been applied because the case involved "environmental issues".

2. Whether the letter and intent of the National Environmental Policy Act were followed where the Federal Power Commission conducted extensive hearings in re-

sponse to the mandate of the Court of Appeals in the first *Scenic Hudson* case [354 F.2d 608 (2d Cir. 1965)] ("Scenic Hudson I") and considered every conceivable issue concerning the environmental effect of the Project and all feasible alternatives to the Project; and where the Commission's procedure adopted the interdisciplinary approach required by the National Environmental Policy Act even though the Act itself was not passed until the Commission's extensive hearings were concluded.

3. Whether the Commission met its responsibilities under 10(a) of the Federal Power Act when it found that the project is ". . . best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use and benefit of interstate or foreign commerce, for the improvement and utilization of waterpower development, and for other beneficial public uses, including recreational purposes; . . .".

4. Whether Section 27 of the Federal Power Act, which has been consistently construed to require only that just compensation be paid for any interference by a licensed project with vested water rights, should be construed to give the City of New York a veto over the Federal Power Commission's license where substantial evidence demonstrates that the Project will not interfere with the City's Catskill Aqueduct and where there is no plan to control, appropriate or use any part of the City's water supply.

Statement of the Case

Petitioners seek review of the October 1971 decision of the United States Court of Appeals for the Second Circuit which reviewed and upheld the license order of the Federal Power Commission issued on August 19, 1970, following an earlier remand of the same FPC proceeding to the Commission in December, 1965 by a decision of the same Court of Appeals in *Scenic Hudson I*. In its October 1971 decision in *Scenic Hudson II*, the Court of Appeals found that the Commission's license order was in compliance with the strict and detailed mandate of its 1965 remand; that there was substantial evidence to support the Commission's decision on all the issues; and that the Commission had complied with all applicable statutory requirements, including those imposed by the National Environmental Policy Act, which was enacted on January 1, 1970, several months after the hearings on remand had closed.

The Remanded Proceedings Before the FPC

The Federal Power Commission first licensed this Project with a partially visible powerhouse by license order issued March 9, 1965. In *Scenic Hudson I* the Court of Appeals found that the Commission had "failed to compile a record which is sufficient to support its decision" (354 F.2d at 612). It directed the Commission to develop a complete record as to the totality of the Project's immediate and long-term effects, specifically covering the need for the Project in the terms of the public good, consideration of all reasonable alternatives to the Project, consideration of the Project's effect upon fish life in the Hudson River, consideration of the preservation of the nat-

ural beauty and the national historic shrines of the Hudson Highlands and consideration of possible additional undergrounding of the Project's transmission lines.

The Commission thereupon ordered that further hearings be held and that all matters be considered in depth. The Company proposed to completely underground the powerhouse. The hearings commenced November 14, 1966 and continued, with several short recesses, until May 23, 1967. Shortly thereafter, the State of Connecticut's Board of Fisheries and Game was permitted to intervene at further hearings in the fall of 1967. The Presiding Examiner spent two days viewing the Project site and also viewed a gas turbine in operation.* On August 6, 1968 the Presiding Examiner issued an Initial Decision recommending that the Project be licensed.

Subsequently, the record was again reopened upon intervention by the City of New York which alleged that the proposed underground powerhouse might pose a risk to the safety of the City's Catskill Aqueduct. The Palisades Interstate Park Commission also then intervened on the issue of the suitability of an alternate powerhouse site beneath Park lands.

At the conclusion of these hearings in May 1969, the record included more than 19,000 pages of testimony and 675 exhibits.

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* Gas turbines (which are land-based jet engines) were proposed by Scenic Hudson as a suitable alternative means of generation. "Gas", as used in describing these turbines, is a misnomer. While turbines can burn natural gas, in the face of the present gas shortage (see *Louisiana Power & Light* v. *FPC*, —— F2d ——, 5th Cir., 1972, cert. granted —— U.S. —— 1972) it is not feasible to use natural gas to fuel such turbines. Instead, they burn kerosene or light oil, a more troublesome potential source of air pollution than natural gas.

The Presiding Examiner issued an eighty-one page supplemental initial decision on December 23, 1969, recommending licensing of the Project at the original site. He found that the Project posed no risks to the safety of the Aqueduct.

All five Commissioners viewed the area of the proposed Project, and on August 18, 1970, the Commission issued its order licensing the Project with the underground powerhouse at the Cornwall site, or, alternatively, at the Palisades Park site.*

Scenic Hudson's vigorous criticism of the Commission's license order for the Project is replete with unwarranted allegations, such as that the Commission's opinion was "mainly concerned with power considerations" (Scenic Hudson's petition for certiorari, p. 3). This simply is not the case. It is difficult to conceive of a more comprehensive treatment of a broad scope of environmental issues by any regulatory agency than that accomplished by the Federal Power Commission in this proceeding. As the Commission observed,

> "In accordance with the mandate of the Court of Appeals and the Commission's planning responsibility under Section 10(a) of the Federal Power Act, and recognizing an affirmative duty to inquire into all relevant facts, our ultimate decision in this case is not the resolution of litigated issues formulated by the parties but rather the determination of public policy by considering 'the totality of the project's 'immediate and

* The FPC has licensed the Project with the powerhouse at the original Cornwall site. In the event that upon court review its decision be overturned, it also licensed the Project with the powerhouse located approximately one mile downstream at a site beneath undeveloped lands belonging to the Palisades Interstate Park Commission.

long range effects' consistent with the public interest. 354 F.2d 620." (FPC Opinion at para. 45; City's Appendix, p. 77a).

The Commission's opinion and order and the 19,000 page record compiled through the years of hearings examined in depth the "totality" of the Project's effects, including issues concerning, among others, the following environmental factors: appearance of the reservoir dikes from nearby and from distant high points; dike safety; likelihood of seepage through or under the dikes or out of the bottom of the reservoir; containment of any seepage; effects of any seepage on local water supplies; nature of lands taken for the reservoir and the best use thereof; plantings on the dikes; effects of reservoir drawdowns; geologic effect of reservoir and tunnel construction; appearance of the river front at the power station site and upstream and downstream therefrom; minutely detailed examination of the appearance of the Project site before, during and after construction, including consideration of access roads, tunnels and even the small ventilating shaft caps; the portal entrance to the underground chambers; planting plans; details concerning tailrace design and excavations; several weeks of hearings concerning the safety of the City's Catskill Aqueduct; fish protection, including consideration of the nature of the fishery, fish behavior, protective screen design and a three-year study of the fishery jointly conducted by federal and state agencies; effects of waterfront rehabilitation and local park construction planned for development and transfer to the Village of Cornwall as part of the Project's recreational benefits; study of the aesthetic, economic and electric system reliability factors associated with the installation of submarine, underground, and over-

local transmission facilities among many alternate routings; study of air pollution control and noise pollution benefits and detriments of the Project and alternate forms of operation; and consideration of the Hudson River Valley as part of our historic and cultural heritage.

The foregoing is not intended to be exhaustive, and it does not include reference to the important issue of economic power supply and the critical issue of a reliable power supply; nor does it indicate the depth of the Commission's study of suggested alternatives to the project which run the gamut of existing and developing technology from "gas" turbines and nuclear plants to pumped-hydroelectric stations and fuel cells. However, it does illustrate the careful attention directed to the environment by the Commission and supports the Court of Appeals' conclusion that:

> "The thrust of petitioners' arguments is that the principle of preservation of scenic beauty permits of no intrusion at all into this area and that, therefore, no power plant, no matter how unobtrusive, may be built. This is clearly a policy determination which, whatever may be our personal views, we do not have the power to impose on the Commission. The Commission has complied with the terms of our remand by giving careful and thorough consideration to the impact of the project on the environment. The conclusions it has reached are supported by substantial evidence." (453 F.2d at 473-6; City's Appendix, p. 25a).

Of course, Scenic Hudson disagrees and may adduce evidence contrary to that which is contrary to its own viewpoint, even to the extent of cross-examining Mr. Gilmore-Clark as a "professional interloper" and a "self-serving" witness (see Scenic Hudson's petition for certiorari at p. 22, fn. 16). Such charac-

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[illegible] of any witness are improper, but when applied to professional judgments of the qualifications of Mr. Clarke and Mr. Herbert Conover, the other witness referred to in the footnote, they are shocking. Mr. Clarke founded the Department of Regional Planning in the College of Architecture and Engineering at Cornell University, was a member and chairman of the Commission of Fine Arts in Washington, and is a former "Collaborator at Large" for the National Park Service. He is also senior partner in the firm of Clarke & Rapuano, which has been described by the Federal Power Commission as "one of the country's leading firms of landscape architects". Mr. Conover is director of the Parks, Recreation and Site Planning Department of Old, Hall & Rich with more than thirty years experience in planning, designing and constructing parks and recreational areas.

Aside from Messrs. Clarke and Conover, witnesses in the proceeding included such well known personalities as Professor Charles W. Eliot of Harvard, who testified for Scenic Hudson, David Brower, who testified for the Sierra Club, Mr. Leon Keyserling, who testified for the Utility Workers of America, Dr. Edward J. Teller, the noted physicist and consultant to Governor Rockefeller, who testified on power reliability and air pollution control, Conrad Wirth, former Director of the National Park Service, and Brooks Atkinson. In addition, many experts prominent in their particular disciplines presented extensive testimony to the Commission.*

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* The witnesses before the Commission were: *Acoustical engineer:* Stanford M. Potter; *Civil engineers:* J. Barry Cooke, Don U. Deere, Torrie Eble, Abraham Grossman, James M. Mullarkey, Phillip C. Rutledge, Jack M. Shipley, Fred C. Stein, William E. Trommershausen, Malcolm T. Watt, Herbert C. Westfall, Gerald

Project Description

The Project is a pumped-storage hydroelectric plant of 1000 megawatts (1,000,000 kilowatts) capacity comprised of an underground powerhouse near the Hudson River, connected by a water tunnel to an upper reservoir about two miles inland and 1,000 feet above the level of the River, together with transmission lines connecting the Project to Con Edison's transmission system. The transmission lines from the Project comprise submarine and underground cables beneath the Hudson River and beyond its east bank to a point entirely out of sight of the Hudson River, and overhead lines running about twelve miles from the underground termination point to connect with exist-

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R. Wilson; *Economists:* Rev. William T. Horan, Leon Keyserling, Reginald M. Neale; *Electrical engineers:* William J. Babe, John V. Bonner, F. N. Case, Charles P. Dawson, Dr. Eric T. B. Gross, Joseph J. A. Jessel, Dr. Alexander Kusko, Alexander Larkin, William B. Mack, E. Harris Pratt, M. L. Waring; *Fish biologists:* Theodore R. Hampton, Mike C. Ball, Forrest R. Hauck, James R. Westman, Edward C. Raney, William H. Massman, Alfred Perlmutter, Robert E. Stevens, Charles H. Wallburg; *General engineers:* Joseph J. Salters; *Geological engineers:* Charles P. Berkey, Thomas W. Fluhr, Portland P. Fox, Dr. Bartlett W. Faulding, Jr.; *Geologists-geophysicists:* A. Scott Warthin, Jr.; *Hydraulic engineers:* Lawrence C. Neale, Charles H. Wagner; *Mechanical engineers:* H. W. Herman, Arthur S. Pearson; *Nuclear engineers:* Joseph J. Di Nunno, John M. Valliere; *Physicists:* Dr. Edward Teller; *Planners:* William Binkley, Robert S. Bryan, Gilmore D. Clarke, Charles W. Eliot, II, Peter Harrison, Robert Mickle, Herbert S. Swan; *Real estate appraisers:* Morris H. Bannister, William M. Kinnard, Jr. Also, *Art historians:* Rudolf G. Wunderlich; *Art professors:* Vincent J. Scully; *Conservationists:* Brooks Atkinson, David Brower, Charles H. Callison, Phillip E. Dodge, Richard E. Harrison, Richard Hooper Pough, Anthony Wayne Smith; *Ecologist:* Ronald E. Hayes; *Historians:* Carl Carmer, Margaret Farnsworth, Benjamin Fraser, Jean Saunders; *Public officials:* A. K. Morgan, Gordon Canfield, Richard J. Donahue, J. H. Downey, Harold J. Dyer, Joseph X. Mullin, Conrad Wirth, James E. Wright; and *Science writers:* Jerome Wyckoff.

ing transmission lines. The Project is designed to meet the needs of New York City and Westchester County for electricity by pumping water from the Hudson River into a storage reservoir during hours of low energy demand at night and on weekends, and releasing the water to generate electricity during hours of greatest, or "peak", demand.* The Project will operate essentially as a storage battery to provide necessary reliability to the interconnected electric system by providing virtually instantaneous response at times of system emergency, such as the one which resulted in the blackout over Northeastern United States in November, 1965 (*Scenic Hudson II*, 453 F.2d at 471; City's Appendix, p. 16a).

The underground powerhouse will be constructed in solid granite deep beneath the surface on the west bank of the Hudson River at the northerly edge of the Hudson Highlands. Construction of the Project at this location will permit combined use of the area's unique geography to assist in the supply of critically needed electrical energy to the Con Edison and interconnected systems, as well as to help preserve and enhance the scenery of the area for public recreation and enjoyment. The Project site originally contained some 32 run-down structures, all but one of which have been removed by Con Edison. Penn Central Railroad tracks run along the River's edge in front of the

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*City lists as one of the reasons for its opposition concern for the quality of the air because it believes that most of the pumping energy necessary for Cornwall will be generated by in-City plants. However, as the Commission found, the Con Edison system, using the Project, provides the best means of alleviating air pollution resulting from electric generation in New York City of any of the many alternates examined, with the exception of an all nuclear alternative to Cornwall, which is unsuitable from the standpoint of providing reliability to the system (FPC Opinion at para. 92, City's Appendix, p. 94a).

underground powerhouse site and directly across the Project tailrace, or water outlet. While the Highlands are indeed scenic and attractive, the immediate Project area has been blighted by the decay of nineteenth century industrial and commercial buildings. The Project will provide scenic improvement of this area and offer needed public access to the River's edge for recreational purposes.

The top of Storm King Mountain rises more than 1,500 feet above and about one mile to the west of the River. The perimeter of its base extends more than 3,500 feet along the River. In this context, the Commission found and the Court of Appeals affirmed that the few visible features of the Project will be of no scenic consequence in the scale of the Project's natural environment.

Nevertheless, petitioners persist in their dramatized descriptions of the effect of the Project on the scenery of the area. They say the mountain will be "wounded" and will "have its legs cut from under it". These and similar expressions are not supported by the facts. For example, petitioners consistently refer to the proposed Project as an "industrial" intrusion in the Hudson Highlands. But they ignore the fact that, unlike most "industries," the powerhouse will be underground. Moreover, the Project will be operated by remote control from a dispatching center in New York City. The on-site operating staff will comprise only a small maintenance crew. Operation of the Project will not involve any of the activities characteristic of conventional "industrial" factories, such as heavy employee traffic at the time of shift-changes, in-shipment of raw materials, out shipment of finished products, visible industrial buildings, noise, etc.

There Is No Basis for the Granting of the Requested Writ

1. ***The Second Circuit acted correctly under decisions of this Court, and pursuant to the Federal Power Act, in determining that the Commission's findings, policy judgments and conclusions were supported by substantial evidence, were rationally based, and were made in accordance with law.***

Section 313(b) of the Federal Power Act provides that:

> "The findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive." 16 U.S.C. 825*l*(b).

In 1966 this Court interpreted the statutory standard of substantial evidence as

> "... something less than the weight of evidence and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo* v. *Federal Maritime Commission*, 383 U.S. 607 at 620 (1966).

As recently as 1971 this Court, applying that same standard, found that another Court of Appeals had "overstepped the role of the judiciary" when that court substituted its decision for the decision of the Commission (*Gainesville Utilities Department* v. *Florida Power Corporation*, 402 U.S. 515 at 527 (1971)).

This Court has consistently held that the licensing of Projects such as this plant has been entrusted by Congress to

> "... the informed judgment of the Commission, and not to the preferences of reviewing courts." *Permian Basin Area Rate Cases*, 390 U.S. 747 at 767 (1968).

Petitioners attempted to have the Court of Appeals apply a different standard of judicial review in this case, alleging that the substantial evidence test should not apply to environmental issues. The Court below properly rejected that contention, holding that none of the cases relied on by petitioners (*Citizens to Preserve Overton Park Inc.* v. *Volpe*, 401 U.S. 402 (1971); *Udall* v. *Federal Power Commission*, 387 U.S. 428 (1967); *Zabel* v. *Tabb*, 430 F.2d 199 (5th Cir. 1970), *cert. denied*, 401 U.S. 910 (1971)), nor any other authority sanctioned a new or different standard of judicial review. In all of the cases relied on by petitioners, the reviewing courts found that there was failure of an agency or other governmental authority to give adequate consideration to the environmental factors in the situations with which they were presented. However, the court below found that where, as here, the Commission has considered all relevant factors and where the challenged findings based on such full consideration are supported by substantial evidence, the decision below must stand. The Court of Appeals adopted the correct standard of review and applied it properly.

Petitioners invite this Court to apply different standards of review. Petitioner Scenic Hudson argues that the substantial evidence standard is not a proper one for review of the Commission's findings on scenic beauty. Petitioner City argues that such a standard is not a proper one to review the Commission's findings with regard to the safety of the Catskill Aqueduct. Neither of these contentions has any merit in law.

The Commission, under Section 10(a) of the Federal Power Act, has been authorized and directed to consider

all aspects of a project's development.* Indeed, almost twenty years ago, the Commission refused to license a project solely because of what it regarded as the adverse environmental impact of the Project on aesthetics and recreation, and its decision was upheld by the Seventh Circuit Court of Appeals (*Namekagon Hydro Co.* v. *FPC*, 216 F. 2d 509 (7th Cir. 1954)).**

The Court of Appeals employed the proper standard of review of all of the Commission's findings under the directives of this Court and pursuant to the Federal Power Act. There is no basis in law for overturning its decision. Indeed, in view of the statutory mandate, no imperative or useful purpose would be served by a grant of certiorari to review the issue posed.

2. *The Court of Appeals was correct in finding that the requirements of the National Environmental Policy Act have been fully met.*

The Court of Appeals found that all the requirements of the National Environmental Policy Act ("NEPA") had been fully met by the FPC:

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* Petitioners' reliance on the *Calvert Cliffs'* decision (*Calvert Cliffs' Coordinating Comm.* v. *AEC*, 449 F.2d 1109 (D.C. Cir. 1971)) is thus misplaced. Unlike the FPC, prior to the enactment of the National Environmental Policy Act (42 U.S.C. §§4321 et seq.), the Atomic Energy Commission had no authority to inquire into the aesthetic or environmental aspects of any project before it.

** Scenic Hudson is thus incorrect in arguing that it is "only in this case" that the Commission has had to face the problem of scenic beauty. In every application for license for a major (over 2,000 horsepower) project, the Commission requires (18 C.F.R. §4.41) that a proposed plan for full public utilization of project waters and adjacent lands for "recreational purposes" be submitted. Recreational purposes, as the Court of Appeals has pointed out (see p. 26 *infra*) includes ". . . the conservation of natural resources, the maintenance of natural beauty, and the preservation of historic sites."

"The Commission has complied with the specific directives contained in Section 102 of the Act. The hearings reflected the 'systematic, interdisciplinary approach' required by that section. The Commission consulted with other agencies, as required by Section 102, including the Chief of Engineers, the Advisory Council on Historic Preservation, the Department of the Interior, the Atomic Energy Commission and a number of state and local groups that stand to be affected. The environmental statement required by Section 102(2)(C) of the Act, 42 U.S.C. §4332(2)(C) (1964), was submitted in the form of the Commission's opinion. In view of the exhaustive environmental findings which occupy a substantial portion of the Commission's opinion, and the Commission's explicit conformance with the enumerated portions of the required statement, we conclude that full compliance with the National Environmental Policy [Act] has been demonstrated." (453 F.2d at 481; City's Appendix, p. 37a).

Scenic Hudson suggests that the submission of the Commission's opinion to the Council on Environmental Quality was a purely mechanical compliance with Section 102(2)(C)(i) of the Act which did not provide ". . . a framework which will ensure individualized consideration to all important environmental factors" (Scenic Hudson petition, p. 22). However, the "framework" required to protect the environment in this proceeding was established by *Scenic Hudson I* and the Commission's own broad investigation. Most importantly, there was extensive, detailed and vigorous litigation concerning virtually every environmental aspect of Project construction and operation which occupied the five years between reviews by the Court of Appeals and which is indicated by the partial specification of environmental issues set forth at pages 7-8 *supra*.

In considering these issues, the parties and the Commission went beyond the mere recitation of opinion as to the environmental effects of the Project and focused upon fact.

For example, Scenic Hudson's petition at page 23, note 11, refers to testimony that the tailrace,

> "cut into the mountain slope would be a permanent wound in the side of the mountain which could change the character of the scene; it would "'cut the legs out from under the north flank of mountain by destroying the continuity of its base as it rises out of the water'—a continuity" essential to the sweeping lift which gives the profile of Storm King its remarkable energy."

That is sweeping and energetic rhetoric, but it is hardly consistent with the fact that the maximum rock cut for the tailrace visible above the existing railroad embankment passing in front of the tailrace will reach but twenty feet above that railroad against a backdrop of a mountain more than 1300 feet high. Moreover, vines will be planted above the cut so as to partially obscure even that feature. Far from "belittling" any adverse environmental effects of the Project, as Scenic Hudson petulantly claims at page 23 of its petition, the Commission cast such effects in their true light by testing rhetoric against fact and concluding that:

> "The evidence in this proceeding establishes that the project as now designed is compatible with the natural environment and will have no adverse effect on the ecology of the area. No water pollution or damage to the fishery of the river will be created by the project. No diminution of the water quality in the river will result from the project. Air pollution by reason of the project will be less than would otherwise be possible

in meeting the needs for electric energy. New recreational resources will be created by the project. None of the numerous alternatives considered in detail can meet the social, economic, and environmental requirements of our society as well as the proposed project. Its potential contribution to reliable electric energy to insure the health, safety, and convenience of millions of people is unique and unequalled by any other alternative. The capability of the proposed project to meet the peaking energy requirements is not exceeded by any alternative and its capability to do so in a more economic manner is also established by the record in this proceeding. Any short-term adverse impact on the natural environment is more than offset by the enhancement of long-term productivity which will result from the project. The resources which will be committed to this project are the acreage it will necessarily encompass and the fuel resources which will be committed to pumping energy. But the electric energy resources which will be generated by the commitment of such resources will many times over 'foster and promote the general welfare' and 'fulfill the social, economic and other requirements of present and future generations'."

. . .

"Accordingly, we are licensing this pumped storage project because the record in this proceeding establishes that this is the best use of available resources to meet the requirements for electric energy with the minimum adverse impact on our environment. The record establishes that no alternative can so well meet the requirements with lesser detriment to our environment." (FPC Opinion paras. 217 and 218; City's Appendix, pp. 134a-135a).

Scenic Hudson's contention that the Commission did not comply with the goals and directives of NEPA ignores the language and legislative history of the Act and dis-

torts the intent of its expression of legislative policy. There can be no reasonable doubt that the Commission's compliance with the Court of Appeals' remand means that it more than complied with the far more generalized language of NEPA.

The Council on Environmental Quality recognized the Commission's Opinion and Order in this case as the equivalent of a separate impact statement by accepting the Commission's opinion and order as a statement on environmental impact. The Council's list of final impact statements compiled from March 20, 1970 through December 17, 1970 includes the Commission's license order as the impact statement for the Project (1 Environmental Reporter: Current Developments 899 (No. 35, December 25, 1970)).

Petitioner's allegation concerning inadequate compliance with the consultative requirements of Section 102(2)(C) are not supported by the record. Considerable and appropriate consultation did take place during the proceedings prior to the Commission's decision with all those having "jurisdiction by law or special expertise", as follows:

(i) The Commission submitted Con Edison's plans for the Project to the Chief of Engineers, U.S. Army, and received his approval as far as the interests of navigation were involved (FPC Opinion, para. 173).

(ii) The Commission also submitted the Project plans and a Staff brief relating to the Project to the Advisory Council on Historic Preservation (16 U.S.C. §470 et seq.). The Council found:

> "Plans I, II and Alternate II presently under consideration by the Federal Power Commission are almost

identical in the minimal adverse effect on the scenic values for which the Park was initially established. None of the plans affects adversely the cooperative effort that permits the continuation of the Park as a conservation area" (Quoted in FPC Opinion, para. 203).

The balance of the Commission's findings concerning the Advisory Council are set forth in its August 19, 1970 order, reprinted at pages 129a-131a of City's Appendix.

(iii) The Department of Interior was advised of Con Edison's plans and participated fully in the proceedings.

(iv) The Atomic Energy Commission made available its Assistant Director of the Division of Safety Standards, to present evidence as to regulatory and radiation safety criteria relating to siting of nuclear units. Mr. John V. Vallance, Senior Technical Assistant in the Office of Program Analysis of the Division of Reactor Development on Technology, AEC, testified as to current nuclear capital and operating costs generally.

(v) The City of New York, the Palisades Interstate Park Commission, the New York State Water Resources Commission, the Taconic State Park Commission, and many municipalities affected by the Project all participated in the proceeding.*

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* Scenic Hudson's petition at pages 20-21 states that the Bureau of Outdoor Recreation of the Department of the Interior and the Hudson River Valley Commission both recommended that the project "not be built". These assertions are not correct. The Bureau's report, entitled "Focus on the Hudson", and issued in 1966 referred to the remanded proceedings and the Department's position on the project as follows:

"The Federal Power Commission has scheduled a rehearing in September 1966 on the application of Consolidated Edison of New York. The Department of the Interior will intervene

(vi) The United States Public Health Service, Division of Air Pollution, was consulted by the FPC Staff in 1966 on the Project's effect on the alleviation of air pollution in New York City. The Public Health Service's expert, Mr. Ralph Longaker, testified for the Staff at the Commission hearings.*

The Petitioners invite this Court, despite the findings of the Court of Appeals, to use this case as a vehicle to instruct the federal agencies on proper compliance with NEPA, even though the record in this proceeding was closed prior to the passage of NEPA. Petitioners ignore

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in the rehearing for the purpose of presenting additional information as to the effect of the proposed project on fish and on scenic, historic, and other recreation resource values. At a pre-hearing conference on March 22, 1966, the Department stated that it expected to recommend that the powerhouse be placed underground."

The Hudson River Valley Commission recommended that the Project not be built, "if a feasible alternative can be found". The Federal Power Commission determined that none could be found. Moreover, the New York State Joint Legislative Committee on National Resources, referred to in note 9 on page 21 of Scenic Hudson's petition, held its hearings in 1964, eighteen months before the Company revised its plans in order to install the powerhouse completely underground.

Whatever the views of these agencies, the final policy decision as to whether or not the Project should be licensed lies with the Commission.

* Mr. Longaker's Division of Air Pollution Control was reorganized into the National Center for Air Pollution Control prior to the time he was cross-examined in 1967. The National Center later became part of the National Air Pollution Control Administration (NAPCA) (33 Fed. Reg. 9909 (1968)), which subsequently merged into the Environmental Protection Administration (35 Fed. Reg. 15623 (1970)). Accordingly, City is mistaken in its claim (City's Petition, pp. 23-24) that the Commission failed to consult the proper expert agency on air pollution matters in the case (i.e., NAPCA). The fact is that Mr. Longaker was an important official of the then principal Federal agency for air pollution control.

the fact that this is a "transition" proceeding; that is, the hearings were complete when NEPA became law. In that respect, the proceeding must be unique or at least but one of very few proceedings similarly cast. Hence, it would not be appropriate to select this proceeding as a vehicle to instruct the lower courts concerning NEPA requirements, if, indeed, such guidance is necessary. It is evident from the number of cases cited in Appendix B to Scenic Hudson's petition, that the lower courts are not reluctant to instruct the agencies as to the proper compliance with NEPA requirements. The broad language of NEPA was intended by Congress to enable the various agencies to work out its applicability to the matters before them individually in accordance with the particular circumstances presented in each case.

3. The Project will not endanger the Catskill Aqueduct.

The City argues that the Commission's decision to license the Project was made "in disregard of the City's objections" (Petition, p. 26). This is not so. In fact, the City's objections were considered at length. However, City's claims were unsupported by the evidence presented.

Con Edison presented the testimony and exhibits of several expert witnesses attesting to the safety of the Catskill Aqueduct during the initial hearings on remand in 1966-67. After the Presiding Examiner had concluded in his Initial Decision issued in 1968 that the safety of the Aqueduct was not endangered by the Project, the hearings were reopened in 1969 specifically to permit the City, which had not previously intervened, to present the basis of its claims with regard to the Aqueduct. After hearings at

which the City, the Commission Staff and Con Edison presented witnesses on this issue, briefing, and a second lengthy opinion of the Presiding Examiner, the Commission found that there was no basis for the City's concern for the safety of the Catskill Aqueduct. The Court of Appeals carefully reviewed the evidence upon which the Commission based its findings and found that there was substantial support in the record for those findings.

The evidence is indeed substantial. The Examiner's 1968 Initial Decision concluded that construction of the underground powerhouse would not endanger the existing aqueduct and that construction of a by-pass would not be required.* This conclusion was amply supported by the evidence of record.

City's direct evidence at the March, 1969 hearings, when stripped of rhetoric and speculation, consisted of a few lines of testimony by Mr. Thomas Fluhr, an admittedly over-cautious geologist (Fluhr, R. 16,847),** who has worked for the City for years.

Mr. Fluhr's very generalized direct testimony was simply that, either with or without a by-pass:

> "The risk of failure of the aqueduct cannot be regarded as imminent but it represents a definite hazard. . . ." (Fluhr, R. 16,837-8.)

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* In an effort to alleviate the City's concern, the Company proposed to relocate a section of the existing Aqueduct so that when in use the Aqueduct would "by-pass" the power station by more than 400 feet, which the City conceded to be a safe distance. However, the City also objected to some aspects of the by-pass plan.

** References are made herein to the record before the Commission, which has not been reproduced. If the Court desires, Respondent will make the testimony and exhibits referred to available.

Then on cross-examination Mr. Fluhr admitted:

> "I think while the risk may be small, I think that there is certainly some risk. . . . My view is that the risk is small." (Fluhr, R. 16,846.)

In rebuttal to City's claims, Con Edison, supplementing its presentation on this issue made prior to the Examiner's 1968 Initial Decision, presented the testimony of Dr. Bartlett Paulding, a geological engineer and a specialist on the brittle fracture of rock, with a doctorate from MIT in rock mechanics.

Dr. Paulding's sophisticated analysis confirmed the previous judgments of Con Edison's other experts (see Exhibit 464) that the underground powerhouse would have no significant effect on the Aqueduct.

City's witnesses attempted to buttress their speculative opinions by pointing to a cracking of part of the aqueduct tunnel lining which occurred in 1913 when it was first tested under pressure (Eide, R. 16,793-94; Fluhr, R. 16,835-36). Such cracking was probably caused by excessive water pressure during testing and insufficient rock cover (Mullarkey, R. 11,146; Eide, R. 16,805, 16,794). Whatever may have caused this problem, the matter was easily corrected at the time by the construction of a by-pass.

All of this evidence was weighed carefully by the Presiding Examiner and the Commission. It was reviewed with approval by the Court of Appeals. The Court found that the evidence supporting the Commission's decision on the aqueduct issue was abundant and substantial in both quality and quantity, and it emphasized that " . . . the resolution of highly complex technological issues such as these

was entrusted by Congress to the Commission and not to the courts" (453 F.2d at 480; City's Appendix, p. 34a).

The Supreme Court has established the principle that it does not undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error. *Garner Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275 (1949). The obvious showing here is that both the Court of Appeals and the Commission were correct.

In its petition for certiorari, City urges *de novo* review of the rulings by the Commission and Court of Appeals as to the facts by arguing that the FPC has no expertise on the subject of geological engineering or tunnel construction, particularly as related to aqueducts or water tunnels. Therefore, says City, this Court may feel free to review and reverse on the facts. City's argument is patently false.

The Commission is indeed expert on the construction of water tunnels and in fact is responsible under the Federal Power Act for the licensing of all hydroelectric "project works" including tunnels and all related appurtenances. Over the last 50 years, the Commission has licensed and monitored construction of literally hundreds of project dams, tunnels and reservoirs. We invite the Court's attention to the Commission's Annual Report for the year 1970 at pages 31-33 and at Table I for a listing of these projects. The same Annual Report at page 32 refers to the Commission's intimate involvement with the California Aqueduct project, a 460-mile municipal aqueduct which contains twelve pumping stations, four dams, four storage reservoirs and four generating stations, including a large pumped storage project. This massive combined aqueduct and

hydro project exemplifies the Commission's experience with water tunnel construction. Indeed, it is almost too elementary to point out that virtually all hydroelectric facilities include water tunnels, which are physically the same as public water supply aqueducts, with the possible exception that hydro tunnels have more complex engineering problems due to their association with related generating facilities. The Federal Power Commission is expert in this area, and is in fact designated by Congress as the agency to weigh the evidence and make informed engineering judgments on the subject. As the Court of Appeals recognized, judges learned in the law but without technical education, training and experience, and without the advice of those who are expert in technical matters are neither prepared nor charged to make such determinations. The City's contention is mistaken.

4. *The Cornwall Project meets the standards of Section 10(a) of the Federal Power Act as best adapted to a comprehensive plan for the development of the Hudson River.*

The Court of Appeals referred to Section 10(a)* as follows:

> "This is the statute upon which, to a large extent, our earlier remand was based. In our opinion we said that the phrase 'recreational purposes' 'undoubtedly encompasses the conservation of natural resources, the maintenance of natural beauty, and the preservation of

* Section 10(a), in pertinent part, requires that a project " . . . be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways, for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water power development, and for other beneficial public uses, including recreational purposes; . . . ".

historic sites.' *Scenic Hudson*, supra at 614. We directed the Commission to consider all of these factors in reaching its decision.

"It is obvious that in finding compliance with our remand order, we also find compliance with the statute on which that order was based. As we have pointed out, the Commission has given careful and thorough consideration to 'recreational purposes,' and, indeed, has used its 'authority to require the modification of [the] project' in a number of aspects related to this end." (453 F.2d at 480; City's Appendix, p. 36a).

Petitioners urge that the Project should not have been licensed on the ground that there is not in existence a "comprehensive plan" for the development of the entire Hudson River Valley. That contention is without merit. As respondent's witness, Gilmore Clarke testified, it is unlikely that there will ever be a *single comprehensive* regional plan for the development and protection of *all* the land and water resources of the Hudson. But Mr. Clarke pointed out that no reasonable plan which might be developed could fail to include the Cornwall Project as an appropriate element.

Mr. Clarke asserted that it is incumbent on any individual or organization desiring to locate on the shore of the River "to direct its activities so that they will not conflict with or impede such public use of the resources of the Hudson River Valley as may be evolved" in such plans. In his opinion, obviously concurred in by the Commission, the Cornwall Project fulfills these criteria.

Mr. Clarke's expert opinion, together with the myriad other matters considered by the Commission as reflected in its Findings 217 and 218 quoted at pages 17-18 *supra*,

clearly justify the Commission's finding that the Project is "best adapted" to a comprehensive plan for the development of the Hudson River; and the Court of Appeals was correct in finding that the Commission fulfilled its responsibilities under Section 10(a) and had sufficient evidence to support its determination.

5. *Section 27 of the Federal Power Act has been consistently interpreted by this and other courts to require only the payment of compensation for water rights vested under state law.*

The City argues that Section 27* of the Federal Power Act bars construction of the powerhouse at the Cornwall site.

City's contention is inappropriate on the facts of this case because the Project plans do not call for any "control, appropriation, use, or distribution" of the City's water supply. The City's assertions on this issue are premised only upon the geological relationship between the powerhouse chamber and the Catskill Aqueduct. Moreover City's proposed interpretation of Section 27 has often been rejected as a matter of law. There is no conflict in the courts below on the interpretation of Section 27.

This Court in *First Iowa Hydroelectric Cooperative* v. *FPC* (328 U.S. 152 (1946)), discussed the meaning of §27, noting that the language, like that of Section 8 of the Reclamation Act of 1922 and the Ferris Public Lands Acts

* Section 27 provides that ". . . nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein." [41 Stat. 1077; 16 U.S.C. 821].

of 1914 and 1916, was used in a purely proprietary sense (51 Cong. Rec. 13,630-31). The Court therefore held that the use in Section 27 of language "having a limited meaning in relation to proprietary rights under the reclamation law and in public land bills" carried the established meaning of such language into the Federal Power Act (*id.* at 177).

Such protection of vested water rights is necessary since the Federal government has a "navigation servitude" over navigable water of the United States and is free from the requirement of paying compensation when it takes over private water rights in navigable waters. See, e.g.: *United States* v. *Chandler-Dunbar Water Power Co.*, 229 U.S. 53 (1913); *United States* v. *Cress*, 243 U.S. 316 (1917); *United States* v. *Willow River Power Co.*, 324 U.S. 499 (1945); *United States* v. *Twin City Power Company*, 350 U.S. 222 (1956); and *United States* v. *Grand River Dam Authority*, 363 U.S. 229 (1960). Section 27 merely makes clear that a Federal Power Act licensee is not clothed with such power. Section 27 requires a licensee to pay compensation if it condemns state-vested water rights, although the Federal government could itself acquire them without any such payment.

That Section 27 does not bar interference by a Federal licensee with local domestic water supplies, and that its sole function is to preserve state-conferred water rights from condemnation without the payment of compensation by the Federal licensee, has been most clearly stated by the Ninth Circuit Court of Appeals in *Portland General Electric Co.* v. *F.P.C.*, 328 F.2d at 176 (9th Cir., 1964):

> "The *only* purpose of section 27 is to preserve to holders of state-conferred water rights a right to compensa-

tion if those rights are taken or destroyed as an incident to the exercise by another, of a license granted by the Commission." (Emphasis supplied).

A number of cases have held that Section 27 requires a licensee under the Federal Power Act to pay damages in compensation for the taking of state vested water rights: *Henry Ford & Son Inc.* v. *Little Falls Fibre Co.*, 280 U.S. 369 (1930); *U.S.* v. *Central Stockholders' Corp. of Vallejo*, 52 F.2d 322 (9th Cir. 1931); *F.P.C.* v. *Niagara Mohawk Power Corp.*, 347 U.S. 239 (1954); *Radford Iron Co.* v. *Appalachian Electric Power Co.*, 62 F.2d 940 (4th Cir. 1933), *cert. denied* 289 U.S. 748 (1933); *In re Green River Drainage Area*, 147 F.Supp. 127 (D.Utah, 1956).

Section 27 does not save state or local regulatory laws. See, e.g.: *First Iowa, supra; FPC* v. *Oregon*, 349 U.S. 435 (1955); *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320 (1958); *State of Washington Department of Game* v. *F.P.C.*, 207 F.2d 391 (9th Cir. 1953), *cert. denied*, 347 U.S. 936 (1954). In these cases, the courts have consistently held that state statutes, which were legitimate exercises of state power, could not prevail in the face of the Federal Power Act because the Federal authority over the nation's waterways and their use is dominant.

The Court of Appeals rejected the City's contentions, pointing out that the license issued

"...does not authorize Con Ed to divert any of the City's water or to interfere with the tunnel .... Section 27 was not intended to give the city the power to veto Commission action" (453 F.2d at 478; City's Appendix, p. 31a).

CONCLUSION

There is no basis in this proceeding for the grant of petitioners' requests for a writ of certiorari.

There is no error in the decision of the Court below; it is in conformity with the applicable statutes, and with decisions of this Court; it has not departed from the accepted or usual course of judicial proceedings.

There is no conflict between Circuit Courts of Appeal on any of the issues which were the subject of the proceeding below.

There is no conflict between the facts as found by the Commission and the facts as found by the Court below.

There are no constitutional issues involved in this case.

With a single exception, all of the statutes relied upon by petitioners have been considered and construed by this Court consistently in the past; the single statute which has not been the subject of extensive review by this Court, namely the National Environmental Policy Act, is not a proper subject for review here because the record in this nine year proceeding was closed at the time of the enact-

ment of that Act and the Court below has found that its requirements have been fully met.

The petitions for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: April 25, 1972

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

Supreme Court, U. S.
FILED
MAY 17 1972
MICHAEL RODAK, JR., CLERK

No. 71-1219

SCENIC HUDSON PRESERVATION CONFERENCE,
Petitioners,

—v.—

FEDERAL POWER COMMISSION,
CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., *et al.*,
Respondents.

No. 71-1220

THE CITY OF NEW YORK,
Petitioner,

—v.—

FEDERAL POWER COMMISSION,
CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., *et al.*,
Respondents.

No. 71-1221

THE SIERRA CLUB AND ITS ATLANTIC CHAPTER,
Petitioners,

—v.—

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CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., *et al.*,
Respondents.

BRIEF OF TOWN OF CORNWALL IN OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI

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Dated: May 8, 1972

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